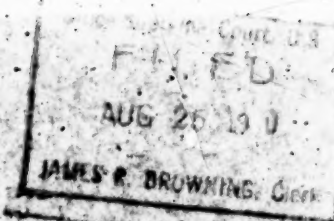


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No. 18



In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE
HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
KANSAS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme Court of Kansas (R. 39-55) is reported at 185 Kan. 274, 341 P. 2d 1002.

JURISDICTION

The judgment of the Supreme Court of Kansas, based on a decision upholding the validity of a state statute that was challenged as repugnant to a law of the United States, was entered on July 10, 1959 (R. 39).

The notice of appeal to this Court was filed on October 6, 1959 (R. 61), and probable jurisdiction was noted on February 23, 1960 (R. 62). The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

STATUTES INVOLVED

The pertinent statutes, 28 U.S.C. 2410 and Kansas General Statutes, 1949, 60-3107, 60-3438 to 60-3463, are set forth in the Appendix, *infra*, pp. 33-42.

QUESTION PRESENTED

Whether the United States, as the second mortgagee of real estate judicially foreclosed and sold to satisfy the first mortgagee's lien in a proceeding to which the United States was made a party under 28 U.S.C. 2410, can redeem within one year from the date of sale, as provided by 28 U.S.C. 2410(c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.

STATEMENT

Appellee The John Hancock Mutual Life Insurance Company ("Insurance Company") instituted this foreclosure action in a Kansas state district court on September 3, 1957, by filing its petition against George and Grace Marie Hetzel, mortgagors, and numerous other potential claimants of interests in the property involved, including the United States (R. 2-10). Process was duly served on the United States, in the manner prescribed by the waiver of sovereign immunity contained in 28 U.S.C. 2410 (R. 17-18).

The Insurance Company alleged that it held the Hetzels' note for \$25,000, secured by a mortgage consti-

tuting a first lien on certain Kansas real estate, on which note the mortgagors were in default. It sought a money judgment and asked that its mortgage be adjudged a first lien superior to any interests claimed by any of the defendants, that the mortgage be foreclosed, and that the property be sold to satisfy plaintiff's claim (R. 2-5, 9-10).

In its answer and cross-petition, the United States asserted that the Farmers' Home Administration held four separate promissory notes, three having been executed by both mortgagors and one by George Hetzel alone, on which a total of \$12,944.83, with interest, was due. One of these notes, in the face amount of \$10,565, was alleged to be secured by a second mortgage on the same property (R. 11-12). The Government acknowledged the priority of the Insurance Company's mortgage but prayed that the total amount of its claims be adjudged a second lien, inferior only to that of the Insurance Company (R. 13).

On December 4, 1957, the state court entered judgment in favor of the Insurance Company for \$26,944.78, with interest and costs, and in favor of the United States for (1) \$10,402.61, with interest and costs, on the note secured by the mortgage, and (2) a total of \$2,642.39, with interest, on the other notes. Holding that the Insurance Company's and the Government's mortgages constituted first and second liens, respectively, the court ordered both to be foreclosed (R. 23-24).

A sheriff's sale was held on January 22, 1958, at which the Insurance Company bought in the property for the amount of its own judgment (R. 25-26, 42).

The United States did not bid at the sale (R. 42). By order of the district court the sale was confirmed on February 5, 1958, and the sheriff was directed to issue a certificate of sale to the purchaser, "fixing the period of redemption at eighteen months from the date of sale" (R. 25-26). The court further ordered that, if redemption was not made within that time, the sheriff should execute and deliver to the holder of the certificate of sale a deed conveying title to the property, free and clear of all claims of the defendants (R. 26).

On June 5, 1958—approximately four and one-half months after the sheriff's sale—the United States attempted to redeem the property, pursuant to the authority of 28 U.S.C. 2410(c). It submitted an affidavit and tendered the appropriate sum of redemption money to the clerk of the state court, in accordance with the procedure prescribed by Kansas General Statutes, 1949, 60-3451 (R. 27-28, 42). This tender was declined and the clerk refused to issue a certificate of redemption (R. 42).

The United States thereupon filed a motion for an order directing the clerk to issue to it a certificate of redemption, alleging that it had made a proper tender of redemption money to the clerk (R. 27-28). The Government based its entitlement to redeem on 28 U.S.C. 2410(c), which provides in relevant part that

* * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. * * *

It was asserted that this provision takes precedence over Section 60-3440 of the Kansas General Statutes, 1949, which stipulates that "[f]or the first twelve months after such sale, the right of the defendant owner to redeem is *exclusive* * * * " (emphasis added). Specifically, the Government's motion stated that (R. 27):

* * * The provisions of Title 28, United States Code, Section 2410(c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein.

In an order dated September 3, 1958 (R. 29), the district court overruled this motion on the ground that it was "without jurisdiction to grant the relief prayed for and [had] no jurisdiction of the subject matter of said motion."

The United States appealed from this order to the Supreme Court of Kansas.¹ In that court the Government pointed out that, as applied in this case, the redemption provisions of 28 U.S.C. 2410(c) conflict with

¹ The United States filed its notice of appeal to that court on October 30, 1958 (R. 29-30). On January 14, 1959, just before the expiration of the one-year period within which, under Kansas General Statutes, 1949, 60-3440, the mortgagors' right to redeem was exclusive, the mortgagors redeemed the property and the clerk of the district court issued a certificate of redemption to them (R. 44).

Section 60-3440 of the Kansas General Statutes, 1949. It contended that its redemption rights must therefore be determined by the federal rather than by the state statute, in accordance with the supremacy clause of Article VI of the United States Constitution. (R. 32, 48-49).

The Supreme Court of Kansas affirmed (R. 39-55). It held, first, that the Government's motion had properly raised the question of its right to redeem under 28 U.S.C. 2410(c). In this connection, the Supreme Court determined that the district court, despite its statement that it was without "jurisdiction" over the motion, had in fact assumed jurisdiction and had overruled the Government's motion on its merits (R. 45-46).²

Second, the Supreme Court ruled that the Government's redemption rights in this litigation are governed by state, rather than by federal, law. This decision was based on two federal court decisions³ which were read

² Appellees Hetzel argued in both the district court and the state Supreme Court that the Government's motion sought a modification of the foreclosure decree and that, under the Kansas rule that a judgment may not be modified after the term in which it is entered, the motion was untimely. In rejecting this contention, the Supreme Court concluded that the district court had not purported to determine the relative redemption rights of the parties when it issued its original foreclosure decree. For this reason, the court held that the motion did not ask for a modification of the decree and that the rule concerning the alteration of judgments was inapplicable (R. 44-46).

This determination of Kansas law by the highest court of the state is final and there is, therefore, no issue before this Court as to the jurisdiction of the courts below to entertain the Government's motion on its merits. *Mettakatta Indian Community v. Egan*, 363 U.S. 555; *Murdock v. City of Memphis*, 20 Wall. 590.

³ *United States v. Cless*, 150 F. Supp. 687 (M.D. Pa.), affirmed, 254 F. 2d 590 (C.A. 3), and *United States v. Ryan*, 124 F. Supp. 1 (D. Minn.). See n. 11, *infra*, p. 27.

as authority for the proposition that "there is nothing in 28 U.S.C., § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens * * *" (R. 52). The court also quoted portions of the Government's mortgage which it thought relevant, and concluded (R. 53):

Considering the terms of the government's mortgage which bound both it and the mortgagors, all the provisions of 28 U.S.C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, * * * we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption * * *.

SUMMARY OF ARGUMENT

28 U.S.C. 2410 (*infra*, p. 33) provides that the United States, under the conditions expressly included there for its "protection," may be named a party in any civil suit in a state or district court to foreclose a lien upon property in which the United States has or claims a lien. Among the protective conditions imposed upon this waiver of sovereign immunity is that, where a judicial sale is made to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem." The issue in this case is whether the Government's statutory right to redeem can be defeated by a state statute which gives the mortgagor the exclusive right to redeem within that period.

A. Kansas law permits real property to be sold upon foreclosure of a mortgage only pursuant to court order,

and gives the mortgagor the exclusive right to redeem within one year thereafter. Junior liens cannot be extinguished through such judicial foreclosure, however, unless the junior lienors are joined in the foreclosure action. Thus, the first mortgagee was required under Kansas law to join the United States (the second lienor) in order to extinguish the Government's lien on the property. Of course, the United States could be joined in such an action only with its consent.

B. In 28 U.S.C. 2410, as originally enacted, Congress consented to suit against the United States only "upon [specified] conditions * * * prescribed for the protection of the United States * * *," including the provision that the United States "shall have" one year after a judicial foreclosure sale within which to redeem. The legislative history shows that this right of redemption was intended to protect the junior interests of the United States where the property was worth more than the amount of the senior lien. It was a substitute for a prior proposal which would have authorized a delay in the foreclosure sale to enable the Government to obtain a Congressional appropriation with which to bid at such a sale.

The federal right to redeem within one year would be ineffective to accomplish its intended purpose of protecting the United States in cases where the property being sold on foreclosure was worth more than the amount of the first lien, if it could be defeated by a state law which prevents junior lienors from redeeming during that period. Nor can the federal right of redemption be limited, as appellees seek to do, to situa-

tions where the senior lien is foreclosed through a non-judicial sale.

C. 1. Since the Kansas law denying junior lienors any redemption rights for one year after the sale directly conflicts with the federal law granting such right to the United States as a junior lienor, the Supremacy Clause of the Constitution requires that the federal law must prevail.

The recent decision in *United States v. Brosnan*, 363 U.S. 237, supports this conclusion. There, this Court, in "adopt[ing] as federal law state law governing divestiture of federal tax liens," stated (p. 241) that it "believe[d] it desirable" to do so "except to the extent that Congress may have entered the field." It further pointed out (p. 246, emphasis added) that "the Government is *guaranteed* a one-year right to redeem if the plaintiff proceeds under §2410 * * *." The instant case comes within the exception noted in *Brosnan*, since here Congress has "entered the field" by guaranteeing the Government one year within which to redeem. Accordingly, the Government's right to redeem must be determined by federal, not state, law. To apply Kansas law to defeat the Government's redemption rights would lead to the anomalous result that the United States could exercise its right to redeem only after the period provided therefor by Congress had expired. Neither the language, the legislative history, nor the basic purpose of Section 2410 supports appellees' suggestion that Congress merely intended to provide a means for redemption in those states which did not give such right to junior lienors.

Indeed, if the United States has no right to redeem, the necessary consequence is that the federal lien has not been discharged. For Kansas law permits a junior lien to be discharged only if the junior lienor is made a party, and Congress has permitted the United States to be sued only upon the condition that it have the right to redeem. If it does not have such right, sovereign immunity has not here been waived, and the United States was therefore not effectively made a party to the state proceedings.

2. While Congress has "entered the field" to guarantee the United States the right to redeem within one year (*Brosnan, supra*), it has not specified the procedures governing the exercise of such right. In the circumstances, we believe that, as a matter of federal law, state law may appropriately be looked to for filling in the details of the federal legislation, i.e., determining the amount required for, and the manner of, redemption.

Since the federal right of redemption cannot be defeated by the state law, the Government's tender of redemption should have been accepted. However, the mortgagers could then have redeemed from the United States by reimbursing it for the amount it paid, plus its claim.

ARGUMENT

The Right That 28 U.S.C. 2410 Gives to the United States, as a Junior Lienor, to Redeem Within One Year Property Sold in Judicial Foreclosure Proceedings Cannot be Defeated by a Provision of State Law Giving the Mortgagor the Exclusive Right to Redeem Within That Period.

28 U.S.C. 2410 (*infra*, p. 33) provides that the United States, under the conditions expressly included there for its "protection," may be named a party in any civil suit in a state or district court to foreclose a lien upon property in which the United States has or claims a lien. Among the protective conditions imposed upon this waiver of sovereign immunity is that, where a judicial sale is made to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem." The issue in this case is whether the Government's statutory right to redeem can be defeated by a state statute which gives the mortgagor the exclusive right to redeem within that period.

We shall show that, since under Kansas law a junior lien may be extinguished in judicial foreclosure proceedings only if the junior lien-holder is made a party thereto, the United States was a necessary party to the state proceedings; that Congress has expressly provided, as one of the conditions of permitting the United States, as a junior lienor, to be made a party to such proceedings, that it have the right to redeem within one year; and that the federal statute granting this right conflicts with the application to the United States of the provision of Kansas law which denies junior lienholders any redemption rights during that period. In these circumstances, the Supremacy Clause of the

Constitution requires that the federal, and not the state, right take precedence.

We emphasize that we are *not* contending that 28 U.S.C. 2410 gives the United States the *exclusive* right to redeem during the one-year period. We contend only that the state law provision cannot defeat the federally-created redemption right of the United States. We discuss this point *infra*, pp. 30-31.

A. KANSAS LAW PERMITS A JUNIOR LIEN TO BE EXTINGUISHED IN JUDICIAL FORECLOSURE PROCEEDINGS ONLY IF THE JUNIOR LIENOR IS MADE A PARTY THERETO. ACCORDINGLY, THE UNITED STATES, AS A JUNIOR LIENOR, WAS A NECESSARY PARTY TO THE STATE FORECLOSURE PROCEEDINGS.

Kansas law permits the sale of real property upon foreclosure of a mortgage only pursuant to a court order. Kan. Gen. Stat., 1949, 60-3107 (*infra*, p. 35); *Motor Equipment Co. v. Winters*, 146 Kan. 127, 131, 69 P. 2d 23; *Pool v. Gates*, 119 Kan. 621, 625, 240 Pac. 580; *LeComte v. Pennock*, 61 Kan. 330, 336, 59 Pac. 641; *Sanders v. Hall*, 74 F. 2d 399, 403 (C.A. 10). Upon the sale of the realty, the sheriff is required to furnish the purchaser a certificate stating that, unless the property is redeemed within eighteen months of the sale, the purchaser will be entitled to an absolute deed.⁴ Kan. Gen. Stat., 1949, 60-3462, 60-3438. As stated by the Kansas Supreme Court in the instant case (R. 48).

⁴ Except in certain circumstances, not here applicable, where the right to redemption does not exist or is limited to six months. Kan. Gen. Stat., 1949, 60-3438, 60-3439.

the mortgagor may redeem the property at any time during the eighteen months. For the first twelve months, his right to redeem is exclusive. For the next three months, his right is concurrent with that of the junior lienholders, who may redeem from the purchaser and from each other. During the final three months, the mortgagor again has the exclusive right to redeem from whomever then owns the certificate of purchase. Kan. Gen. Stat., 1949, 60-3440, 60-3442, 60-3446, 60-3447.⁵ Redemption by the mortgagor cuts off the redemption rights of junior lienholders. Upon the expiration of the redemption period, the holder of the certificate of purchase becomes the absolute owner of the property, free of all liens that were upon the property at the time of foreclosure. Kan. Gen. Stat., 1949, 60-3440, 60-3448, 60-3460.

It is also settled under Kansas law that junior liens cannot be eliminated by the judicial foreclosure of a senior lien unless the junior lienors are made parties to the foreclosure action. *Motor Equipment Co. v. Winters*, 146 Kan. 127, 69 P. 2d 23; *Stacey v. Tucker*, 123 Kan. 137, 254 Pac. 339; *Garber v. Bankers' Mortgage Co.*, 27 F. 2d 609, 610 (D. Kan.); cf. *Henne v. Wood*, 153 Kan. 673, 118 P. 2d 98; *John Hancock Mut. Life Ins. Co. v. Mays*, 152 Kan. 46, 49, 102 P. 2d 984.

⁵ Redemption may be accomplished by paying to the clerk of the trial court an amount equal to that paid by the then holder for the certificate of purchase, plus the amount of such holder's own claim and the sums paid by him for taxes, insurance, and interest. Kan. Gen. Stat., 1949, 60-3443.

Thus, under Kansas law, the Insurance Company (the first lienor) was required to join the United States (the second lienor) as a party to the judicial foreclosure proceedings in order to extinguish the Government's lien upon the property. And, of course, the United States could be joined in such an action only with its consent. *United States v. Brosnan*, 363 U.S. 237; *United States v. Alabama*, 313 U.S. 274; *Minnesota v. United States*, 305 U.S. 382; *The Siren*, 7 Wall. 152.

B. IN 28 U.S.C. 2410, CONGRESS HAS CONSENTED TO THE UNITED STATES BEING MADE A PARTY TO STATE JUDICIAL FORECLOSURE PROCEEDINGS ONLY ON THE CONDITION THAT IT CAN REDEEM THE PROPERTY WITHIN ONE YEAR AFTER THE FORECLOSURE SALE.

Congress first consented to the United States being made a party to state judicial foreclosure proceedings in 1931, 46 Stat. 1528, now codified as 28 U.S.C. 2410, *infra*, p. 33. Congress there provided:

That, upon the conditions herein prescribed for the protection of the United States, the consent of the United States be, and it is hereby given, to be named a party in any suit * * * in any State court having jurisdiction of the subject matter, for the foreclosure of a mortgage or other lien upon real estate, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises involved.^{5a}

^{5a} The changes between the provision as originally enacted and as now set forth in 28 U.S.C. 2410 (*infra*, p. 33) are the result of amendments in 1942 (56 Stat. 1026) and the 1948 revision of the Judicial Code (see *infra*, p. 23).

The legislative history shows that this statute was designed to eliminate the "unfair disadvantage" to which private lienors had been subjected "because of inability to join effectively the Government as a party to judicial [foreclosure] proceedings." *United States v. Brosnan*, 363 U.S. at 248. For, prior to that time, a first lienor—such as the Insurance Company in this case—had found it

impossible * * * to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. * * *

The purpose of this bill is to provide a simple and just method of proceeding in such cases * * *.

H. Rept. No. 95, 71st Cong., 2d Sess., pp. 1-2; ⁶ S. Rept. No. 351, 71st Cong., 2d Sess., p. 2.

⁶ The entire pertinent portion of the House Report is as follows:

This legislation has been recommended for a number of years by the American Bar Association through its committee on removal of Government liens on real estate, the United States League of Local Building and Loan Associations, and by numerous land title companies, in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances the mortgagee finds himself at an impasse. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove

While Congress in Section 2410 "lift[ed] the bar of sovereign immunity which had theretofore been considered to work a particular injustice on private lienors" (*Brosnan, supra*, at p. 246), it did not do so unqualifiedly. On the contrary, the consent to suit against the United States was given only "upon the conditions herein prescribed for the protection of the United States * * *." The power of Congress to impose appropriate conditions upon a waiver of the Government's immunity from suit is, of course, well settled. *Soriano v. United States*, 352 U.S. 270, 276-277; *Munro v. United States*, 303 U.S. 36, 41; *McElrath v. United*

the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment.

The purpose of this bill is to provide a simple and just method of proceeding in such cases * * *

This bill will provide relief from a situation that has caused a great deal of injustice to innocent holders of liens against real estate. The number of liens filed under the revenue laws has been steadily growing * * *. The law provides and equity dictates that the Government's lien in such circumstances should have a junior status, yet under the present practice the inability of the plaintiff to bring the United States in as a party to the proceeding to foreclose or have execution and sale on a court judgment where a Government lien is found to have been placed upon the property subsequently to the time of the plaintiff's encumbrance ties the hands of a prior lien-holder by making it impossible for him to grant a clear title to the property and thus for no just reason deprives him of the benefits of his security or court judgment as the case may be.

States, 102 U.S. 426, 440; *Young v. United States*, 95 U.S. 641; *Nichols v. United States*, 7 Wall. 122, 126.

Congress imposed a number of conditions "for the protection of the United States" in this legislation. It provided for service of the complaint upon both the Attorney General and the United States attorney, gave the United States 60 days within which to answer, authorized the United States to remove a state court suit to a federal court, and gave the United States the right to seek affirmative relief and to bid at the foreclosure sale. In addition, it provided that

where a sale is made to satisfy a lien prior to that of the United States, the United States *shall have* one year from the date of sale within which to redeem [emphasis added].

The legislative history shows that this right of redemption was provided in order to protect the junior interests of the United States where the property was worth more than the amount of the senior lien. A bill to allow the United States to be joined in a foreclosure action instituted by a senior lienor was first passed by the Seventieth Congress. 70 Cong. Rec. 4450, 4539. This bill contained no provision by which the United States could protect its junior lien interest in the foregoing circumstances. See S. Rept. No. 1830, 70th Cong., 2d Sess.; H. Rept. No. 2744, 70th Cong., 2d Sess. The bill was killed by a pocket veto. See 72 Cong Rec. 1998.

In the Seventy-first Congress, the Judiciary Committee of the House reported a bill (H.R. 980) identical to that passed in the previous Congress. See H. Rept. No. 95, 71st Cong., 2d Sess. p. 1; 72 Cong. Rec. 1998. During the debate on the floor of the House, a question was raised as to whether, under the scheme of H.R. 980, the United States could protect its rights in property worth more than the senior lien (72 Cong. Rec. 3120, 3121):

Mr. BLOOM. How could the United States protect itself in a subordinate lien against any property if it should go to a foreclosure? If it goes to a foreclosure, if I may be permitted to add to my question, the United States, to protect its second lien, would have to get an appropriation. It could not go in and buy and protect its first mortgage.

Mr. GRAHAM. We would have nothing to do with the detail of how the United States would protect itself. The United States has its status the same as any other second-lien creditor, citizen, or corporation. Why should it be put in a different position?

Mr. BLOOM. The United States is not in the same position, because it can not go in and buy the first lien to protect its second lien. It has not the money or the right to do it.

Mr. GRAHAM. It ought not to do it, either.

Mr. BLOOM. It can not do it.

Mr. GRAHAM. And it will not do it.

Mr. BLOOM. I asked the chairman of the committee [Mr. Graham] a question with reference to the chance of the Government to protect itself in a subordinate lien on a piece of property in a case where it would not be within the power of the Government at any time to protect the subordinate lien. If a person wanted to be dishonest, the Government could not come in and protect its lien at any time without first coming to Congress to get an appropriation to buy and protect the first mortgage in order to protect the second mortgage.

Mr. HAWLEY. My understanding is that if the Government has a lien and there is a prior incumbrance on the property—

Mr. BLOOM. If the Government has a subordinate lien—

Mr. HAWLEY. And proceedings are taken to protect the first lien, the Government's case will be considered, and if the property is worth sufficient not only to pay the prior lien or liens but also to pay the Government lien, in whole or in part, the Government would receive payment in whole or in part.

Mr. BLOOM. If the holder of the first lien wanted to be dishonest, he would bid less than what the first lien amounts to, get the property at a low figure, and the Government would get nothing.

Mr. HAWLEY. The Government has no right to bid in the property.

The bill passed the House with no change pertinent to this question. 72 Cong. Rec. 3122. The Senate, however, added a new section authorizing (1) the United

States to bid at the foreclosure sale and (2) a delay of the sale until the completion of the next succeeding session of Congress so as to allow the Government time to obtain a Congressional appropriation with which to make its bid. See S. Rept. No. 351, 71st Cong., 2d Sess., pp. 1-2; 72 Cong. Rec. 7020.

This addition was stricken by the Conference Committee and the redemption provision now in Section 2410(c) was substituted. In rejecting the Senate proposal for protecting the rights of the United States as a junior lien holder,⁷ the Conference Committee concluded that a federal redemption provision was a more effective method for protecting those rights. It stated (H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4):

* * * The Senate amendment contains a clause allowing the court to stay proceedings on sale until the expiration of the next session of Congress. This was no doubt intended to allow Congress to appropriate money to enable the United States, if a junior lien holder, to bid enough at the sale to take care of prior liens and thus protect its own. In

⁷ It should be noted that the substitute bill gave "the United States, where it owns the first lien, authority to ask for affirmative relief in the form of foreclosure of its lien, and to bid at the sale up to the amount of its claim and expenses of sale." H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4. This provision, now found in Section 2410(c), reads as follows:

* * * where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

place of that the substitute bill provides that if a junior lien holder, the United States shall have a year in which to redeem. That does away with any necessity for a delay of sale.

In sum, this legislative history establishes that Congress intended in Section 2410 to provide a procedure which would guarantee the United States an effective method for protecting its junior interests in cases where the property was worth more than the senior lien. To accomplish this, Congress provided that a judicial sale of property on which the United States has or claims any lien "is to have the same effect [upon the discharge of the liens] as it would have under local law, *but* the United States is given one year to redeem." *United States v. Brosnan*, 363 U.S. at 246 (emphasis added). The right to redeem, however, would be ineffective to protect the interest of the United States if it could be defeated by a provision of state law which prevents junior lienors from redeeming during that period, since this would wipe out the junior federal interest even where the property is worth more than the first lienor's claim.

Appellees contend (Motion to Dismiss or Affirm, pp. 7-9), however, that the statute gives the United States a right of redemption only in those situations where the senior lienor forecloses through a non-judicial sale. Otherwise, they argue, the redemption sentence conflicts with the first sentence of subsection (c), which provides that a judicial sale in an action under the statute "shall have the same effect respecting the discharge of the property from liens and encumbrances

held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated."

There is no foundation in the statutory language for construing the redemption provision as not applying to judicial proceedings. Section 2410(a) provides that, under certain conditions prescribed "for the protection of the United States, the United States may be named a party in *any civil action or suit* * * *" (emphasis added) for the foreclosure of a mortgage upon property on which the United States has a lien. The remainder of the section relates solely to the conditions under which such a "civil action or suit" may be maintained.

Appellees are mistaken in their conclusion that this reading of subsection (c) creates a conflict between its first and third sentences. The statutory history shows conclusively that the redemption provision is intended as a proviso to the first sentence, i.e., as an exception to the general rule that state law governs the effect of a judicial sale.

As originally enacted on March 4, 1931, 46 Stat. 1528, Section 2410(c) read in pertinent part as follows:

Except as herein otherwise provided, a judicial sale made in pursuance of a judgment in such a suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the law of the State, Territory, or District in which the land is situated, * * *.
And provided further, That where a sale is made

to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. * * * [Emphasis in original.]

In this version there was thus no doubt that a judicial sale had the effect provided by local law "[e]xcept as herein otherwise provided," one of which provisions was that the United States should have one year within which to redeem, despite the requirements of local law.

In the 1948 revision of the federal Judicial Code, Congress modified this language by deleting the above-quoted "exception" clause and the words "*[a]nd provided further*" which preceded the redemption provision. These changes were made solely in pursuance of the policy of eliminating superfluous language, which was followed throughout the code revision,⁸ and were not intended to effect any substantive changes in the statute. As the only relevant portion of the Reviser's Note to Section 2410 indicates, "[c]hanges were made in phraseology."⁹ Thus, the 1948 revision of 28 U.S.C. 2410 made no substantive changes in the redemption

⁸ As the House Judiciary Committee stated in its report on the revision (H. Rept. No. 308, 80th Cong., 1st Sess., p. 5):

A clear and uniform style was an important aim of this revision. Concise, clear, and direct expressions were preferred to verbose, redundant and circuitous language.

⁹ See note appended to 28 U.S.C. 2410; the Reviser's Notes were also appended to H. Rept. No. 308, 80th Cong., 1st Sess. In the latter report the House Judiciary Committee stated:

The reviser's notes are keyed to sections of the revision and explain in detail every change made in text. [Emphasis added; *id.* at p. 7.]

provision, which continues as a qualification of the Government's consent to be sued.¹⁰

"C. SINCE THE FEDERAL LAW GRANTING THE UNITED STATES, AS A JUNIOR LIENHOLDER, ONE YEAR WITHIN WHICH TO REDEEM IS IN DIRECT CONFLICT WITH THE KANSAS LAW DENYING JUNIOR LIENHOLDERS THE RIGHT TO REDEEM DURING THAT PERIOD, THE FEDERAL LAW MUST PREVAIL.

1. As we have shown, under Kansas law the state foreclosure proceedings would not have been effective to discharge the junior lien of the United States unless the latter were made a party to such proceedings; and Congress permitted the United States to be made a party only on the condition that it have one year after the foreclosure sale within which to redeem. Kansas law, however, denies junior lienors any right to re-

¹⁰ Appellee further contends (Motion to Dismiss or Affirm, p. 8) that, since the Government was empowered by 7 U.S.C. 1025 to bid at the foreclosure sale, its failure to do so bars it from exercising its redemption rights under 28 U.S.C. 2410(c). 7 U.S.C. 1025 authorizes the Secretary of Agriculture, who exercises supervisory power over the Farmers' Home Administration (the federal agency from which appellees Hetzel obtained their loans, and to which they executed their second mortgage), "to bid for and purchase at any foreclosure or other sale or otherwise acquire property pledged, mortgaged, conveyed, attached, or levied upon to secure the payment of any * * * indebtedness [owing by virtue of any loans made under any programs administered by the Farmers' Home Administration]." This provision, however, is separate and distinct from Section 2410(c), and there is nothing in either its language or its legislative history that indicates that it was intended as a limitation upon the broad and unqualified right of redemption given to the United States by Section 2410 when it is made a party "in any civil [foreclosure] suit in any district court * * * or in any State court * * *."

deem during that period, since it gives the mortgagor the exclusive right to do so. Thus, the attempted application of the Kansas law in this case to defeat the federally-created redemption right of the United States produces a clear and direct conflict between the federal and state law.^f Under the Supremacy Clause of the Constitution (Article VI), the federal law must prevail.

The recent decision of this Court in *United States v. Brosnan*, 363 U.S. 237, fully supports this conclusion. There, in holding that Federal tax liens on real property, junior to defaulted mortgages held by others on the same property, were "effectively extinguished by state proceedings to which the United States was not, nor was required under state law to be, a party" (pp. 238-239), this Court deemed it appropriate "to adopt as federal law state law governing divestiture of federal tax liens, *except to the extent that Congress may have entered the field*" (p. 241, emphasis added). In discussing the statutory provisions "for the enforcement and extinguishment of federal liens" (p. 242), the Court pointed out (p. 246, emphasis added) that

[u]nder § 2410, a judicial sale is to have the same effect as it would have under local law, but * * * the Government is *guaranteed* a one-year right to redeem if the plaintiff proceeds under § 2410. * * *

This "guaranty" to the United States of the right to redeem within one year after sale brings this case within the exception noted in *Brosnan*, that state law will not control the "extinguishment of federal liens" where "Congress may have entered the field." There

is thus present here the "congressional direction" (p. 242) in favor of applying federal law that was found lacking in *Brosnan*. Indeed, to apply Kansas law to define the Government's redemption rights would lead to the anomalous result that the United States could exercise its right to redeem only after the period provided therefor by Congress had expired.

The legislative history of Section 2410 shows that Congress was aware that there would be situations in which the right of redemption granted to the United States would be inconsistent with the rights of junior lienors under state law. The Conference Committee pointed out (H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4):

In many States of the Union there are now laws allowing junior lien holders as well as fee owners a year in which to redeem from execution and foreclosure sale of real estate. It is true that in other States no such equity of redemption exists. However, the provision adds nothing to the present difficulties in States which allow no redemption period, as under present conditions where present lien holders can not sue the United States, the rights of the United States never are barred by foreclosure decree.

While the conflict between state and federal law that concerned the Conference Committee was the granting of a federal redemption right where the state does not provide it for junior lienors, the same considerations are equally applicable where the state does grant such a right, but on terms inconsistent with those

provided for the federal right. In either situation, the federally-created right takes precedence over the inconsistent state-created right, as the Committee impliedly recognized.

Neither the language of Section 2410, nor its legislative history, nor its basic purpose, supports appellees' suggestion (Motion to Dismiss or Affirm, p. 7) that Congress merely "wished to provide a means for redemption in those states where no provision is made for redemption." On the contrary, effectuation of the basic Congressional purpose of providing a remedy adequate "for the protection of the United States" in cases where the value of the property involved exceeds the amount of the first lien (*supra*, pp. 17-21), requires that the broad language in Section 2410 be construed as giving the United States an absolute right of redemption in any case in which its junior lien is divested pursuant to state judicial foreclosure proceedings.¹¹ As

¹¹ Neither of the two federal cases relied upon by the court below (*United States v. Ryan*, 124 F. Supp. 1 (D. Minn.), and *United States v. Cless*, 150 F. Supp. 687 (M.D. Pa.), affirmed, 254 F. 2d 590 (C.A. 3) (R. 49-52)) is in point. *Ryan* held only that a federal tax lien was invalid because state recording statutes had not been followed; its reasoning was subsequently rejected by the Eighth Circuit in *United States v. Rasmuson*, 253 F. 2d 944, 946. *Cless* held (254 F. 2d at 592) that 28 U.S.C. 2410 "was not intended to require the joinder of the United States, but was merely a waiver of sovereign immunity by a consent to be sued in those situations where the foreclosing creditor might be required to join the government as junior lienor under local law." Since the state law there involved (Pennsylvania) does not require the joinder of junior lienors, the court ruled that the foreclosure sale of a first mortgage extinguished the second mortgage of the United States, even though the latter had not been made a party to the proceedings. That was also the situation in *Brosnan*, which involved Pennsylvania law. Unlike Pennsylvania, however, Kansas is one of the "states where it is necessary to join the junior lienors" (254 F. 2d at 593).

indicated, the Supremacy Clause precludes the application of the inconsistent Kansas law to defeat this right.¹²

The only other reported case which has considered the redemption provision of Section 2410(c) fully supports our position. In *First National Bank and Trust Co. v. MacGarvie*, 22 N.J. 539, 126 A. 2d 880, the United States, which held a junior tax lien on New Jersey real estate, had been made a defendant in a foreclosure action brought by a first mortgagee. Within a year after the foreclosure sale, the United States attempted to redeem pursuant to 28 U.S.C. 2410. Under New Jersey law, a junior lienor could not have redeemed at that

(see *supra*, p. 13), and the United States was therefore here made a party.

The court also relied upon *Federal Land Bank v. Ludwig*, 157 Kan. 657, 143 P. 2d 784, but it has no pertinence. It concerned only the right of a junior lienor to redeem under Kansas law between the twelfth and fifteenth months after the sale. The court held that the junior lienor had such a right. No mention was made of 28 U.S.C. 2410.

¹² There is no merit to the implication by the Supreme Court of Kansas that the Government in its mortgage contract agreed to be bound by state law despite the redemption provision of Section 2410(c). See R. 46-47, 53. While it is true that the mortgage is entitled "Real Estate Mortgage for Kansas," and that the "laws of the State of Kansas" are referred to in paragraph 23 thereof, the instrument also stipulates "that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power, or remedy of Mortgagee, *whether herein set out or conferred by law* * * *" (R. 35, 37, 38; emphasis added). The designation of the contract as a "Kansas" mortgage and the reference to state law in paragraph 23 are, therefore, not to be construed as an adoption of any provision of state law in conflict with Section 2410(c), which expressed "the federal policy to protect the treasury and to promote the security of federal investment * * *" *United States v. View Crest Garden Apts.*, 268 F. 2d 380, 383 (C.A. 9), certiorari denied, 361 U.S. 884; and see *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294.

time. 22 N.J. at 545; and see, New Jersey Stat. Ann., 2A:50-4. However, the Supreme Court of New Jersey—although holding that the Government had not made a sufficient tender—recognized the Government's right to redeem despite the absence of such a right under state law. It declared (22 N.J. at 547):

We recognize the federal right and will give it effect where a sufficient tender is made within the time prescribed by *section 2410(c)*. [Emphasis in original.]

Indeed, if the decision of the Supreme Court of Kansas that the United States has no right of redemption is correct, the necessary consequence is that the federal lien has not been discharged by the state foreclosure proceedings. For a judicial sale is effective to discharge "the property from liens and encumbrances held by the United States" (28 U.S.C. 2410(c) *infra*, p. 33) only if the conditions imposed by Congress upon the waiver of sovereign immunity have been met, including the one-year right of redemption. If the United States has no such right of redemption here, there has been no effective waiver of sovereign immunity, and the United States was therefore not validly made a party to the state proceedings. Cf. *Vincent v. P. R. Matthews Co.*, 126 F. Supp. 102, 105 (N.D. N.Y.), and *City Bank of Anchorage v. Eagleston*, 110 F. Supp. 429, 430 (D. Alas.).¹³ In such circumstances, Kansas

¹³ These cases respectively held that non-compliance with the provisions of Section 2410 giving the United States the right of removal to a federal court, and requiring that the complaint state

law itself provides that the junior lien has not been discharged.

2. Although Congress has "entered the field" to guarantee the United States one year within which to redeem (*Brosnan, supra*), it has not similarly spoken with respect to the manner in which such right of redemption should be exercised. In these circumstances, we believe that, as a matter of federal law, state law may appropriately be looked to as a source for filling in the details of the federal legislation. Cf. *Board of County Commissioners v. United States*, 308 U.S. 343, 349-350; *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210. The federal law will thus take precedence over the state law only to the extent necessary for the effectuation of the federally-created rights.

We do not contend that the federal redemption right is exclusive in the sense that its mere existence precludes the exercise of state-created redemption rights. Rather, as we stated in the state trial court, the federal right is "coexistent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein" (R. 27). It is coexistent in the sense that, during the one-year period, (1) the mortgagor still has the exclusive right to redeem as against all junior lienors other than the United States; (2) if the mortgagor does so redeem, it is fully effective if the United States does not exercise its redemption

"with particularity" the interest of the United States, would preclude the United States being made a party to the lien enforcement proceedings.

rights during the year; and (3) if the United States redeems, the mortgagor may, in turn, redeem from it, upon the same terms and conditions that state law prescribes for the redemption from other junior lienors.

However, we submit that when the United States did elect to redeem within the year, the clerk of the Kansas district court was required to accept the Government's tender, and to issue a certificate of redemption to it. The mortgagor could then redeem from the Government by tendering the amount the latter paid upon redemption plus the amount of its claim, "and including all sums paid * * * for taxes, insurance premiums, and interests or sums due," in accordance with Kan. Gen. Stat., 1949, 60-3443.

We further think it appropriate to look to state law to determine the amount which the Government must pay, and the manner in which the tender of payment should be made, in order to effect redemption under Section 2410(c). For this reason, the tender of redemption which the Government made to the clerk of the court below was made "in keeping with the provisions of Section 60-3451, General Statutes of Kansas, 1949" (R. 27). This tender comported with the decision in the *MacGarrie* case, *supra*, which held that the amount required to effect redemption under 28 U.S.C. 2410(c) should be measured by the normal state-law rule. While recognizing the Government's right to redeem, the Supreme Court of New Jersey held that "the amount necessary to effectuate the right is governed by the *lex rei sitae*." 22 N.J. at 547.

CONCLUSION

As stated above (*supra*, p. 5, n. 1), the mortgagors, appellees Hetzel, were issued a certificate of redemption on January 14, 1959. In order to accord the Government the full relief to which it is entitled, this certificate of redemption should be cancelled. The United States should be permitted to redeem by again tendering its check to the clerk of the district court of Edwards County, Kansas, for the amount necessary under Kan. Gen. Stat., 1949, 60-3451. The clerk should then be directed to issue a certificate of redemption to the United States, which will take precedence over all prior redemption proceedings had in this action, and which will give the United States all the rights which would have flowed from such a certificate had it been issued when first applied for.

The judgment of the Supreme Court of Kansas, affirming the trial court's denial of the Government's motion for an order directing the clerk to issue to it a certificate of redemption, should be reversed and the cause remanded with instructions to permit the United States to redeem the property in accordance with the procedure outlined above.

Respectfully submitted,

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AUGUST 1960.

APPENDIX

1. 28 U.S.C. 2410 provides as follows:

Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought, and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the

property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptrol-

ler General who may issue a certificate releasing the property from such lien.

2. The pertinent provisions of the Kansas General Statutes, 1949, are as follows:

60-3107. Judgment in action to enforce mortgage, deed of trust, or other lien or charge; sale of property. In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment or judgments shall be rendered for the amount or amounts due, as well to the plaintiff as other parties to the action having liens upon the mortgaged premises by mortgage or otherwise, with interest thereon, and for the sale of the property charged and the application of the proceeds; or such application may be reserved for the further order of the court; and the court shall tax the costs and expenses which may accrue in the action; apportion the same among the parties according to their respective interests, to be collected on the order of sale or sales issued thereon. When the same mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county shall make sale of the lands situated in the county of which he is sheriff. No real estate shall be sold for the payment of any money, or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale.

60-3438. Deed or certificate to purchaser of real estate; waiver or right of redemption void. After sale by the sheriff of any real estate on execution, special execution or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but

if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of the costs up to said date; stating that, unless redemption is made within eighteen months thereafter according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same: *Provided*, That any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

60-3439. Right of redemption by defendant owner; junior lien holders; agreements to shorten period or waiver by corporations. The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be six months from the date of sale, and all junior lienholders shall be entitled to three months to redeem after the expiration of said six months: *Provided*, That the right of redemption shall not apply to oil and gas leases, or oil and gas leasehold estates. In all sales of oil and gas leases under order of sale the property shall be appraised as in the case of sales of real estate on execution, and no such property shall be sold for less than two-thirds of the appraised value thereof: *And provided further*, That any corporation organized under the laws of the United States, the District of Columbia or any state of the United States, may, as mortgagor, agree in the mort-

gage instrument to a shorter period of redemption than eighteen months, or may wholly waive the period of redemption as against said corporation mortgagor only and all such agreements when so made shall be fully binding on such mortgagor.

60-3440. Redemption by lien creditor of defendant, when. For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within fifteen months from the date of sale. A mechanic's lien, before decree enforcing the same, shall not be deemed such a lien as to entitle the holder to redeem.

60-3441. Creditors who may redeem. Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption of creditors may redeem. A mortgagee may redeem upon the terms hereinafter prescribed before or after the debt secured by the mortgage falls due.

60-3442. Creditors who may redeem from each other. Creditors having the right of redemption may redeem from each other within the time heretofore prescribed, and in the manner hereinafter provided.

60-3443. Terms of redemption; rights of parties. During the period allowed for the redemption of real property from sale under execution, special execution or order of sale, the holder of the certificate of purchase may pay the taxes on the lands sold, insurance premiums on the buildings thereon, and interest or sums due, upon any prior lien or encumbrance thereon; and upon the redemption of the premises from such sale the holder of the certificate shall be entitled to repayment of all sums thus paid

by him, together with interest thereon. The terms of redemption shall be in all cases the reimbursement of the amount paid by the then holder of the certificate of purchase, added to his own claim, and including all sums paid by him for taxes, insurance premiums, and interest or sums due, as shown by receipts or vouchers to be filed in the office of the clerk of the district court, with interest, together with costs, subject to the exemption contained in the next section. But where a mortgagee or other lienholder, as provided for in this code, whose claim is not yet due, is the person from whom redemption is to be made, he shall receive in payment the full amount paid by him, as stated in his certificate of redemption, together with interest, together with the actual amount of his claim at the date of redemption.

60-3444. Senior creditor redeeming from junior creditor; amount required. When a senior creditor redeems from a junior, the senior creditor shall only be required to pay the amount of those liens which are paramount to his own, and with interest and costs appertaining to the same.

60-3445. Junior creditor may prevent redemption by senior creditor. A junior creditor may prevent redemption by the senior creditor or the holder of the paramount lien by paying off the lien, or depositing with the clerk of the district court beforehand the amount necessary to remove said lien.

60-3446. Junior creditor may redeem from senior creditor. A junior judgment creditor or lienholder may redeem from a senior judgment creditor or lienholder by paying to the party himself or to the clerk of the district court the full sum due said senior creditor or lienholder, with interest and costs, and shall become thereby vested with full title to the judgment so redeemed from and to all liens of such judgment.

60-3447. Time in which creditors may redeem from each other. After the expiration of fifteen months from the day of sale, the creditors can no longer redeem from each other, but the defendant owner may still redeem at any time before the end of the eighteen months as aforesaid.

60-3448. Effect of failure of debtor to redeem. If the defendant or holder of the legal title fails to redeem as herein provided, the purchaser or the creditor who has last redeemed prior to the expiration of the fifteen months aforesaid will hold the property absolutely.

60-3449. Same; effect of redemption by creditor. In case it is thus held by a redeeming creditor, his lien and the claim out of which it arose will be held to be extinguished, unless he pursue the course pointed out in the next section.

60-3450. Same; creditor may file statement of amount credited on his claim; time for filing. If he is unwilling to hold the property and credit the defendant owner therefor with the full amount of his lien, he must, within ten days after the fifteen months aforesaid, file with the clerk of the district court a statement of the amount that he is willing to credit on his claim; and in order to redeem said real estate, the defendant shall only be bound to pay the amount so stated.

60-3451. Mode of redemption; affidavit; receipt and entry by clerk. The mode of redemption as herein provided is by paying the money into the office of the clerk of the district court for the use of the persons thereunto entitled. The person so redeeming, if not the defendant owner in execution or order of sale, must also file his affidavit or that of his agent or attorney, stating as nearly as practicable the amount still unpaid due on his claim. The clerk

shall give him a receipt for the money, stating the purpose for which it is paid. He must also enter the same upon a book kept for that purpose; with a minute of such redemption, the amount paid, and the amount of the lien of the last redemption or as sworn to by him.

60-3452. Last creditor redeeming entitled to assignment of certificate of purchase. The last creditor who redeems prior to the fifteen months shall be entitled to receive an assignment of the certificate of purchase issued by the sheriff as hereinbefore directed.

60-3453. Redemption of property sold in parcels. Whenever the property has been sold in parcels; any distinct portion thereof may be redeemed by itself, and if creditors other than the original purchaser have redeemed, the amount of their claim shall be added to each parcel pro rata in proportion to the amount for which the same was originally sold.

60-3454. Redemption of undivided portion. When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately.

60-3455. Owner's right of redemption may be transferred; not subject to execution. The rights of the defendant owner in relation to redemption may be assigned or transferred, and the purchaser or assignee thereof shall have the same right of redemption as the defendant owner; but the right of redemption shall not be subject to levy or sale on execution.

60-3456. Holder of legal title has same right of redemption as defendant in execution; possession. The holder of the legal title at the time of issuance of execution or order of sale shall have the same right of redemption upon the same terms and conditions as the defendant in execution, and also shall be en-

titled to the possession of the property the same as the defendant in execution, as hereinbefore provided.

60-3457. Deed at end of redemption period; to whom executed; liens and debts of deceased. If the defendant in execution or order of sale, or his assigns, or the owner of said legal title, fail to redeem, the sheriff must, at the end of the redemption period herein provided, execute a deed to the person who is entitled to the certificate of purchase as hereinbefore provided, or his assignee. If the person entitled to a deed be dead, the deed shall be made: (a) If such person died intestate, to the persons entitled thereto under the laws of descent and distribution; and (b) if such person died testate, to the person, association, or corporation entitled thereto under the will of the deceased owner; but the property will be subject to all liens or to the payment of the debts of the deceased in the same manner as if acquired during his lifetime.

60-3458. Record of evidence of purchase of real estate to be made, when. The purchaser of real estate at sale on execution or order of sale or special execution must place evidence of his purchase upon record within six months after the expiration of full time of redemption; up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer.

60-3459. Injury or waste after sale; recovery of damages. The purchaser or party entitled to a deed under sale, as hereinbefore provided, may, after the deed is made to him by the sheriff, recover damages for any injury or waste permitted upon the property purchased after the sale and before possession is delivered under the conveyance.

60-3460. Real estate once sold; second sale not permitted, when. Real estate once sold upon order

of sale, special execution or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for.

60-3461. Injunction or receiver to protect property; rights of parties. The holder of the certificate of purchase shall be entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction; or, when required to protect said premises against waste, appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed, and shall be entitled to rent, control and manage the same; but the income during said time, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of its legal title.

60-3462. Application of redemption act. The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanics' lien, or other lien, whether special or general, and the terms of redemption shall be the same.

60-3463. Sheriff's return of sale; confirmation of sale by court; sheriff's certificate of purchase. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same, and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in this act.